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graph company to limit its liability in this manner, it is apparent that the Supreme Court's decision in this important case settles a troublesome question in a manner which conduces to harmony and which will prevent a considerable amount of uncertain litigation on this subject in the future.

C. W. B. T.

UPON WHOM SHOULD THE BURDEN FALL TO ESTABLISH THE VALIDITY OF AN ALTERATION IN AN INSTRUMENT?—The overwhelming weight of authority supports the view that a certificate of deposit in the ordinary form is negotiable and is, both in substance and legal effect, a promissory note, and to be governed by the rules that apply thereto.¹ In *Forrest v. Safety Banking Trust Co.*,² a certificate of deposit in the regular bank form was held to be a negotiable instrument within the provisions of the Pennsylvania Negotiable Instruments Law of 1901. In such a negotiable instrument a material alteration by the payee or transferee is a good defense, except as against a holder in due course.³ And it cannot be questioned that an alteration which changes the amount of the note or other written instrument, is a material one, both at common law⁴ and under the Negotiable Instruments Law.⁵ But it surely would seem that if such a material alteration is apparent on the face of the document, one who takes such an instrument cannot be considered a holder in due course under that section of the Negotiable Instruments Law which provides that, "A holder in due course is a holder who has taken an instrument which is complete and regular on its face."⁶ This view is strongly emphasized in three recent cases⁷ in which the preceding section of the N. I. L. was cited and it was held that one who took an instrument with an alteration plainly apparent on its face, could not be considered the taker of an instrument which was complete and regular on its face. In another case the same section was cited but was not made the basis of a similar result.⁸

¹ *Miller v. Austen*, 54 U. S. 218 (1851); *First National Bank v. Stapf*, 165 Ind. 162, 74 N. E. 987 (1905); *Hanna v. Manufacturers Trust Co.*, 104 App. Div. N. Y. 90, 93 N. Y. S. 304 (1905); *Lamar Drug Co. v. National Bank of Albany*, 127 Ga. 448, 56 S. E. 486 (1906); *Kavanaugh v. Bank of America*, 239 Ill. 404, 88 N. E. 171 (1909); *Kushner v. Abbott*, 156 Iowa 598, 137 N. W. 913 (1912).

² 174 Fed. 345 (1909).

³ Sec. 124b. "But where an instrument has been materially altered and is in the hands of a holder in due course, not a party to the alteration, he may enforce payment thereof according to its original tenor."

⁴ *Cape Ann National Bank v. Burns*, 129 Mass. 596 (1880); *Fordyce v. Kosmininski*, 49 Ark. 40 (1886); *Burrows v. Klink*, 70 Md. 451, 17 Atl. 378 (1889); *Heard v. Tappan*, 116 Ga. 930, 43 S. E. 375 (1902).

⁵ Sec. 125. What constitutes a material alteration? "Any alteration which . . . changes the sum payable either for principal or interest."

⁶ Sec. 52. (1).

⁷ *Elias v. Whitney*, 50 Misc. N. Y. 326, 98 N. Y. S. 667 (1906); *Pensacola Bank v. Melton*, 210 Fed. 57 (1913); *Farmers State Bank v. West*, 77 Ore. 602, 152 Pac. 238 (1915).

⁸ *Harrison v. Pearcey*, 174 Ky. 485, 192 S. W. 513 (1917).

The great difficulty however is under sub-division *a* of sec. 124 of the N. I. L.,⁹ where the plaintiff is not a holder in due course, for the authorities are in irreconcilable conflict as regards the time when an alteration apparent on the face of the instrument was made. Must the holder establish the validity of the alteration in the instrument upon which he wishes to recover, or must the one who alleges that the instrument has been fraudulently changed, offer proof to that effect? The cases on the subject fall within two classes. The first class leaves the burden of proof upon the proponent where tradition has placed it, while the second class changes the burden of proof and places it on him who denies the validity of the instrument. While this change is sometimes effected directly by a judicial or statutory declaration,¹⁰ the same result is often reached by some so-called presumptions, operating until the contrary appears by a preponderance of the evidence. The American Courts are here following their usual practice in discussing this question in terms of presumptions, but there are no presumptions based on probability plus the difficulty of proof. As Mitchell, J., points out in *Wilson v. Hayes*,¹¹ the mere fact of an alteration creates no predominance of probability as to the time when it was made, either before or after execution. The appearance of the document, the similarity or difference in the handwriting or ink, or other peculiarity in the handwriting, and the nature of the subject matter of the alteration might raise inferences one way or the other; but such appearance and subject matter are of such infinite variety, that no general presumptions of this sort could properly exist. Whatever presumptions there are owe their recognition to the desire of the court to throw the burden of proof upon the holder, even though the traditional theory was to the effect that a document to be valid must be fair and perfect on its face. That an alteration should not of itself invalidate an instrument, was therefore a mitigation of the strictness of the earlier law; but for a time, even an immaterial alteration was fatal unless made before execution. Even after it became settled law that only an immaterial alteration had no invalidating effect on an instrument, the traditional view remained strong enough to regard a material alteration as *prima facie* destructive of the force of the instrument, and to require him who alleged that he fell within the newer mitigating exception to prove the facts which brought his case within it. When the land-owning aris-

⁹ "Where a negotiable instrument is materially altered without the assent of all parties liable thereon, it is avoided, except as against a party who has himself made, authorized, or assented to the alteration and subsequent indorsers."

¹⁰ *Wheat v. Arnold*, 36 Ga. 479 (1867). Under the Georgia Code, an alteration only invalidates a note or other written instrument if made intentionally by a party claiming under it, in a material part and with intent to defraud. Clear and satisfactory proof is required so that all notion of any fraudulent intent is rebutted.

¹¹ 40 Minn. 531, 42 N. W. 467 (1889).

tocracy of England, politically dominant, became conscious of the danger to their titles lurking in this doctrine,¹² the courts, themselves springing from the aristocracy, or looking forward to forming a family which would be a part of it, and so desiring to give stability to titles depending on ancient deeds and other manuscripts, were naturally anxious to give *prima facie* validity to even obviously altered instruments. But the traditional theory had to be overcome before titles could be protected from destruction through the carelessness or laziness of some scrivener, long dead and gone. Courts are naturally, and perhaps properly, adverse to an open rupture with tradition; but the object was obtained by one of those presumptions which have little relation to the probative value of the data, but which require the assumption of some fact until its non-existence is established, because the court desires to settle such cases as though the fact existed. Such presumptions express no principle common to the whole law of proof; but as a practical matter they do change the law in the particular field in which they operate. And this was more obvious while parties were incompetent as witnesses, and particularly where, by lapse of time, or because the transaction was of such a type, that the parties were usually the only participants. In such cases a presumption changing the burden of proof was, in practical effect, often of as much actual effect as one which precluded proof to the contrary. To change the burden of proof as to the date of an alteration, so as to require the maker to invalidate the instrument by showing that the alteration was subsequent to the execution, instead of requiring the holder to prove that it was made prior to it, where the mouths of both were closed, left the question to be decided upon the nature of the alteration.

There are a considerable number of jurisdictions¹³ which place the burden of proof upon the person alleging the alterations, to show not only the fact of alteration, but also that it is such an alteration as invalidates the instrument. Some courts account for this by a presumption against fraud and in favor of innocence. One cannot but feel that this so-called presumption of innocence is used to justify a change in the law of contracts, which concerns written instruments and their alteration. It enables the courts to give effect to their convictions that a writing should not be vitiated by an alteration, unless it is shown to have been subsequent to its execution. The formalistic conception of a solemn deed, that it was only valid if perfect, is much like the old idea of the destruction of the priestly office by the mutilation of the incumbent. This sort of presumption, like so many artificial

¹² Doe dem. Titmouse v. Aubrey, reported in Samuel Warren's "Ten Thousand a Year."

¹³ Cochran v. Nebeker et al., 48 Ind. 459 (1874); Wilson v. Hayes, 40 Minn. 531, 42 N. W. 467 (1889); Franklin v. Baker, 48 Ohio St. 296, 27 N. E. 550 (1891); Portsmouth Savings Bank v. Wilson, S. App. D. C. 8 (1894); Richardson v. Fellner, 9 Okla. 513, 60 Pac. 270 (1900).

presumptions, serves, like a legal fiction and a conclusive presumption of law to which it closely approximates the purpose of conforming a new theory to an old practice, or a new practice to an old theory, without a definite break with tradition; and thus it changes the law.

A recent New Mexico decision¹⁴ refused to adopt any of the so-called presumptions and held that the question was one solely for the jury. However, it put on the defendant, the maker, the burden of going forward with the evidence, relative to his allegation that the alteration was made after execution. Probably the majority of the cases hold, in close conformity with the older concept, that the burden of explaining an alteration rests on him who relies on the instrument.¹⁵ This rule which requires explanatory proof by the party producing it, certainly cannot be criticized as unfair or as contrary to any legal principle. For, as was well said by Turnbull, J.,¹⁶ "Written instruments are supposed to be the repositories of the intentions of the parties, but they would surely be very unsafe repositories of such intentions, if the party having possession of an instrument was at liberty to alter it at his pleasure, and then call upon the other party to show that the alteration was made after execution, or else be bound by its contents." Suppose that a note has been altered after its execution, how can the maker show that fact? It would seem more reasonable to require the holder of an instrument which has been altered to explain the alteration, than to require the maker, who probably has not seen the note since its execution, to show that the alteration has been made since that date. Otherwise the maker must take evidence of the appearance of the note when it was delivered

¹⁴ *Luna v. Montoya*, 184 Pac. 533 (New Mexico, 1919). The instrument was a book entry, which the trial court considered as a certificate of deposit, and ruled: 1. That the rights and liabilities of the parties were to be governed by the same principles of law as are applicable to bank certificates of deposit. 2. That the alteration of the amount in the instrument was so apparent as not to be suspicious. 3. That no presumption either way arose in respect to such an alteration. 4. That although the question was one for the jury to decide in respect to when the alteration was made, the defendant, the maker, had the burden of proof in showing that the instrument was altered after execution. The Supreme Court of New Mexico affirmed these four rulings.

¹⁵ *Knight v. Clemens*, 7 L. J. Q. B. N. S. 144 (Eng., 1838); *Wheat v. Arnold*, 36 Ga. 479 (1867); *Slater v. Moore*, 86 Va. 26, 9 S. E. 419 (1889), "Every alteration on the face of a written instrument detracts from its credit and makes it suspicious, and the party claiming under it is ordinarily bound to remove this suspicion"; *Est. of Nagle*, 134 Pa. 31, 19 Atl. 434 (1890); *Ehrenkrook v. Webber*, 100 Mich. 314, 58 N. W. 665 (1894). Under the N. I. L. the burden is on the holder, *Elias v. Whitney*, *supra*. In Eng. the rule applies to all commercial paper because of the requirements of the Stamp Act, which provides that all bills and notes must be stamped before they can be used as evidence, and that if a bill is altered after it issues, no matter by whom, it becomes another bill and requires a new stamp. Therefore one who offers an altered instrument in evidence must show that the alteration was made before the instrument was complete.

¹⁶ *Walters v. Short*, 10 Ill. 252 (1848).

in order to protect himself against subsequent alterations made without his consent. It certainly would be easier for one who takes an instrument, to have an alteration or an interlineation noted, either in an attestation clause or in a marginal note, than to require the maker to prove that the alteration was made after he signed it. So, too, a forger in order to meet with a fair chance of success, need only make a bold alteration in the instrument, and then take it into court; and unless the maker could satisfy the jury that the note had been changed since it had left his hands, the verdict would be in the forger's favor. Even in those cases where none of the so-called presumptions are indulged in as to who and at what time the alteration was made, but the question is considered as one for the jury, the holder is required to explain the alterations for the jury's benefit and satisfaction.¹⁷ And unless he satisfies that burden by a preponderance of the evidence, he fails.

The Pennsylvania rule as expressed in *Colonial Trust Co. v. Getz*¹⁸ appears to be, that if the instrument clearly shows upon its face that it has been altered as to some material part, it is incumbent upon the party claiming under it to remove the suspicion which attaches, and to account for the alteration. Until this is done the note cannot be admitted in evidence. But if there is doubt as to whether there is in fact an alteration, the jury may receive the instrument and pass upon this question first. If they find that there has been an alteration, then, unless the one who offers the instrument proves that it was altered before or at the time of its execution, the jury must disregard the instrument entirely. A Florida case¹⁹ with a similar problem in regard to a bill of exchange, was decided exactly the same way upon the authority of an old English case.²⁰

Those courts which follow the view that the burden is on the maker to prove a subsequent alteration, do so with the proviso that this only applies until an inspection of the document shows a suspicious alteration and the cases are handled somewhat like those cases where, although the burden of proof of contributory negligence is on the defendant, the plaintiff may be non-suited if, in telling how he was injured, he kills his own case by showing that he was in fact guilty of contributory negligence. For if the holder, in introducing the instrument, raises any suspicion against

¹⁷ *Vaughan v. Fowler*, 14 S. C. 355 (1880); *Croswell v. Labree*, 81 Me. 44, 16 Atl. 331 (1888); *Maguire v. Eichmeier*, 109 Iowa 301, 80 N. W. 395 (1899); *Merritt v. Boyden*, 191 Ill. 136, 60 N. E. 907 (1901).

¹⁸ 28 Pa. Super. Ct. 619 (1905). The defendant as payee of a note was sued on his indorsement by the Trust Co. Defendant's counsel objected to the note being put in evidence because of two alterations which he claimed were apparent on the face of the note, one in respect to the original date, the other as regards the due date. The Superior Court of Pennsylvania considered the alterations in question as not apparent but merely suspicious.

¹⁹ *Harris v. The Bank of Jacksonville*, 22 Fla. 501, 1 So. 140 (1886).

²⁰ *Desbrow v. Weatherly*, 6 Car & P. 758 (Eng., 1834).

himself, he must remove it. A loose use of the word presumption occurs in respect to what is called a suspicious alteration. So long as the parties were incompetent to testify, the only evidence usually available was intrinsic to the instrument. If the proponent had the burden of proof, it is clear that if on inspection the alteration was in his handwriting, and was favorable to him, or if an erasure was of a clause in the interest of the maker, he has not produced sufficient evidence to justify a jury in finding that the preponderance of probability was that the alteration was prior to execution. So far as it goes, the probative force of the data known to the jury is to the contrary. If then the proponent has no other evidence to produce, he has failed to validate the altered instrument. It seems quite clear that the fact of an erasure, an interlineation, a change, a correction, the filling in of a blank, or the fact that the sentence written is longer than the space allotted to it, and therefore is written on a slant or extends into the margin, is not so probative of an alteration, either before or after execution, as to serve as the basis of a presumption of the sort which operates to relieve a party from showing the existence of what is normally implied from the data known to the court and jury. The probative value of the erasure, etc., depends on the circumstances; and with the growing prevalence of prepared and written forms to fit the average case, which require a certain amount of erasure and interpolation to suit the occasion, the hurry and rush of modern business, which precludes the re-writing of documents containing errors, the notorious inaccuracy in both mechanical and human typewriters who have now taken the place of the long ago extinct race of careful draughtsmen, the mere presence of a change in the written matter of an instrument may as well be the correction of a mistake as a subsequent change. Neither the holder nor the maker, in general, has any greater power than the other to prove an alteration. And even though both parties could testify, yet the nature of the alteration was often the only means of proof; and therefore, though there might have been ground for creating a presumption based on the general difficulty of proving a legally important and constantly recurring fact, yet such difficulty of proof is not sufficient. The data must be such that the fact assumed is one which is the normal inference therefrom. Here the data is of an infinite variety, both in itself and in its probative value in connection with such intrinsic facts as are usually provable; and there is no experience to show that it is so usual for a particular change to be made before or after execution, that the contrary is abnormal.

J. H. C.

CANCELLATION OF DEEDS EXECUTED UNDER INFLUENCE OF THREATS OF CRIMINAL PROSECUTION.—The term duress combines the idea of involuntary action with that of unfair advantage taken